

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34415

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| STATE OF IDAHO, |) | 2009 Unpublished Opinion No. 380 |
| |) | |
| Plaintiff-Respondent, |) | Filed: March 10, 2009 |
| |) | |
| v. |) | Stephen W. Kenyon, Clerk |
| |) | |
| PAUL EUGENE McBRIDE, |) | THIS IS AN UNPUBLISHED |
| |) | OPINION AND SHALL NOT |
| Defendant-Appellant. |) | BE CITED AS AUTHORITY |
| |) | |

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

Case remanded for consideration of defendant's request for substitute counsel.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Paul Eugene McBride appeals from his judgment of conviction for possession of methamphetamine. He asserts that the district court denied his right to counsel or his right to self-representation when it did not act upon his complaints about his appointed counsel.

I.

BACKGROUND

In early January 2007, McBride was arrested and charged with one count of possession of drug paraphernalia with intent to deliver, Idaho Code § 37-2734B, and two counts of possession of methamphetamine, I.C. § 37-2732(c)(1). On March 5, 2007 a "Legal Access to the Court Request form" authored by McBride was filed with the district court. The form, addressed to the district judge, stated that McBride was "firing" his court-appointed counsel and was requesting appointment of substitute counsel. It said:

I'm writing this regarding my Attorney Ben Anderson when he came to visit me we discussed my case, I told him this is harassment because I was an X felon he said he didn't care that the county pays his wages and he was going with what the District Attorney says he failed to give me my discovery and I know he is handling my case very unprofessional I'm firing him and requesting Out side council under the 5th and 6th Amendment Right I intitled proper representation on behalf of my defense. Because he failed to follow the Rules of professional conduct Rule 1.1

(spelling and sentence structure as in original). This request was never addressed by the court.

McBride later filed a motion to suppress evidence, but this motion was withdrawn when he reached a plea agreement with the State. The court accepted his plea and set the case for sentencing, but before McBride could be sentenced, he filed a motion to withdraw his guilty plea, which was denied after a hearing. Thereafter, two more documents requesting substitute counsel were filed with the court. One was a letter addressed to the district judge and the other a letter addressed to McBride's defense counsel but also filed with the court. The letters expressed dissatisfaction with the attorney's refusal of McBride's request that he file a motion to reconsider the district court's denial of McBride's motion to withdraw the guilty plea. They also complained that the attorney had not made the arguments that McBride desired in support of the motion to withdraw the plea and claimed that the attorney had misrepresented terms of the plea agreement to McBride. Again, the record discloses no response by the district court. McBride was sentenced in accordance with the plea agreement, and now brings this appeal.

II.

ANALYSIS

McBride asserts that the district court violated his rights under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution by not conducting any inquiry on his written requests for new counsel. McBride contends the court's inaction denied him either his right to counsel or his right to self-representation.

The invocation of one's right to self-representation must be clear, unequivocal, and timely. *State v. Lippert*, 145 Idaho 586, 597, 181 P.3d 512, 523 (Ct. App. 2007). Of McBride's three written communications that can be seen as expressing dissatisfaction with his attorney, none hint at a desire to proceed pro se, let alone invoke that right clearly and unequivocally. Because McBride did not invoke this right below, he has shown no denial of his right to self-representation.

The remaining issue centers on McBride's claim that his right to counsel was violated when the district court did not inquire into his statements indicating he wanted new counsel. The Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution both guarantee the right to counsel. For indigent defendants, this right includes the right to court-appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Pharris v. State*, 91 Idaho 456, 424 P.2d 390 (1967). The right to counsel is not a right to the attorney of one's choice, *Lippert*, 145 Idaho at 594, 181 P.3d at 520; *State v. Clark*, 115 Idaho 1056, 1058, 772 P.2d 263, 265 (Ct. App. 1989), and mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in the absence of extraordinary circumstances. *State v. McCabe*, 101 Idaho 727, 729, 620 P.2d 300, 302 (1980). The constitutional guarantees do, however, entitle a criminal defendant to the assistance of a reasonably competent attorney. *Id.* at 728, 620 P.2d at 301. Upon a showing of good cause, a trial court may appoint a substitute attorney for an indigent defendant. I.C. § 19-856; *State v. Clayton*, 100 Idaho 896, 897, 606 P.2d 1000, 1001 (1980).

When a defendant requests new counsel, the trial court must "afford [the] defendant a full and fair opportunity to present the facts and reasons in support of his motion for substitution of counsel" *Id.* at 898, 606 P.2d at 1002. *See also State v. Nath*, 137 Idaho 712, 52 P.3d 857 (2002); *State v. Gamble*, 146 Idaho 331, ___, 193 P.3d 878, 883 (Ct. App. 2008); *State v. Peck*, 130 Idaho 711, 946 P.2d 1351 (Ct. App. 1997). In *Clayton*, for example, this requirement was satisfied when the trial court asked the defendant to make any statements he wished in support of his motion for substitute counsel. *Clayton*, 100 Idaho at 898, 606 P.2d at 1002.

Here, the court erred when it conducted no inquiry at all on McBride's requests for new counsel. In these requests, McBride listed numerous reasons why he wanted a different attorney. While some of these are either facially invalid¹ or quickly revealed to be invalid by an

¹ To the extent that McBride contends that he was entitled to appointment of substitute counsel because he had filed a complaint against his original attorney with the Idaho State Bar, the contention is without merit. A criminal defendant may not create entitlement to new counsel by manufacturing a conflict with existing counsel through filing a lawsuit or a Bar complaint against the attorney. *See State v. Priest*, 128 Idaho 6, 10, 909 P.2d 624, 628 (Ct. App. 1995); *State v. Browning*, 121 Idaho 239, 244-45, 824 P.2d 170, 175-76 (Ct. App. 1992).

examination of the record,² other of his allegations, if believed by the court after a hearing, could call for substitute counsel. The latter category includes McBride's allegation that his defense counsel stated his intent to "go with what the district attorney says" because the county was paying for McBride's defense. McBride's requests for new counsel were sufficient to trigger an obligation for the trial court to inquire into the reasons for the request and to make a ruling after considering the merits.

The appropriate remedy where the trial court failed to make the necessary inquiry into a defendant's request for substitute counsel is to remand for a hearing on whether the request should have been granted. *Lippert*, 145 Idaho at 596, 181 P.3d at 522. *See also Peck*, 130 Idaho at 714, 946 P.2d at 1354. At the hearing, the district court must conduct a meaningful inquiry into whether the defendant had good cause for his request for substitute counsel. *Lippert*, 145 Idaho at 596, 181 P.3d at 522; *Peck*, 130 Idaho at 714, 946 P.2d at 1354. This will include making "reasonable, non-suggestive efforts to determine the nature of the defendant's complaints" and obtaining the facts necessary to determine whether substitute counsel should have been granted. *Lippert*, 145 Idaho at 596, 181 P.3d at 522 (quoting *State v. Vessey*, 967 P.2d 960, 962 (Utah Ct. App. 1998)). The district court's actual decision whether to appoint new counsel after having made a sufficient inquiry is within the court's discretion. *Nath*, 137 Idaho at 715, 52 P.3d at 860; *Gamble*, 146 Idaho at ___, 193 P.3d at 883; *Lippert*, 145 Idaho at 597, 181 P.3d at 523.

On remand, if the court decides that McBride was entitled to substitute counsel at a point prior to the entry of his guilty plea, McBride must be allowed to withdraw the plea should he elect to do so. If the court finds that he was entitled to new counsel only after the guilty plea, then that plea will stand unless McBride, with the assistance of new counsel, shows adequate reason to allow its withdrawal, but he may be entitled to a new sentencing hearing if he so requests. If, on the other hand, the court finds on remand that McBride was not at any point

² McBride's contention that the terms of the plea agreement were misrepresented to him because he was told that they included a provision that he would be released on his own recognizance pending sentencing is belied by the record. The record contains multiple acknowledgements of the terms of the plea agreement by McBride, and those terms did not include presentencing release on his own recognizance.

entitled to appointment of new counsel, the judgment of conviction and sentence will remain undisturbed.

We remand for further proceedings consistent with this opinion.

Judge PERRY and Judge GUTIERREZ **CONCUR.**